Petition

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81-429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

CHARLES W. WINZER,
Petitioner

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

Whether a Texas trial court has the duty to harmonize a general jury finding of negligence with a specific jury finding of no negligence in order to protect a railroad employee's rights under the Federal Employers' Liability Act.

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IN THE

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OCTOBER TERM, 1981

NO. _____

CHARLES W. WINZER,
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v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles W. Winzer, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in the above entitled case on June 3, 1981.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas is unreported and is printed in Appendix A hereto, *infra*, page A-1. The Notice from the Texas Supreme Court that Peti-

tioner's Application for Writ of Error was refused is printed in Appendix A hereto, *infra*, page A-4. The Notice from the Texas Supreme Court overruling Petitioner's Motion for Rehearing in the Supreme Court of Texas is printed in Appendix A hereto, *infra*, page A-5.

JURISDICTION

Petitioner's Application for Writ of Error was refused by the Supreme Court of Texas on May 6, 1981. (Appendix A, *infra*, page A-4). Petitioner's timely Motion for Rehearing was overruled by the Supreme Court of Texas on June 3, 1981. (Appendix A, *infra*, page A-5). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

Jurisdiction of this Court is authorized by 28 U.S.C. § 1257(3) because petitioner has received judgment from the highest court in the State from which a decision could be had.

STATUTES

This case involves the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. which is too lengthy to set out verbatim. The pertinent portion of this statute is § 51 which deals with the right of a railroad employee to be compensated for injuries he receives due to the railroad's negligence while employed by the railroad. (Appendix B, *infra*, page B-1).

This case also involves the Due Process and Equal Protection clauses of the 14th Amendment to the Constitution of the United States:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of

the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." (Appendix B, *infra*, page B-2).

STATEMENT OF THE CASE

This is a suit brought by an injured brakeman against his railroad employer under the Federal Employers' Liability Act. Petitioner Winzer was seriously injured on May 24, 1975 while performing his duties as a brakeman for Kansas City Southern Railway Company. Specifically, Petitioner's supervisor, Conductor Taylor, ordered him to lift a 150-200 lb. rerailing device. Conductor Taylor knew Petitioner had a bad back and was under doctor's orders not to lift heavy objects. As a result of lifting the rerailing device, Petitioner's back was seriously injured, to the extent that the jury found $300,000.00 in damages.

Petitioner subsequently brought suit against the railroad under 45 U.S.C. § 51, et seq., commonly known as the Federal Employers' Liability Act (F.E.L.A.), for the railroad's failure to supply him with reasonably safe equipment and a reasonably safe place to work. Trial was had to a jury. In response to Special Issue No. 1, the jury found that the Respondent did *not* fail to provide Plaintiff with a reasonably safe place in which to work or with reasonably safe equipment with which to work. However, in response to Special Issue No. 4 the jury found that 50% of the negligence which caused the occurrence was attributable to the Respondent. (Appendix C, *infra*, pages C-1, C-2).

Petitioner filed a Motion for Judgment and a Memorandum of Law in Support of the Motion, on the ground that federal law governs F.E.L.A. cases. Petitioner's argu-

ment at this stage of the proceedings was that the jury's findings were such that, under federal law, the trial court should harmonize them and enter judgment in Petitioner's favor. (Appendix D, *infra*, page D-1). The trial court entered a judgment for the Respondent railroad (Appendix D, *infra*, page D-11) and Petitioner timely filed a Motion for New Trial, which was overruled. (Appendix D, *infra*, pages D-13, D-15). Petitioner appealed to the Texas Court of Civil Appeals, which affirmed the trial court's judgment and later overruled Petitioner's timely motion for rehearing. (Appendix A and Appendix D, *infra*, pages A-1, D-18, D-19). The Supreme Court of Texas refused Petitioner's Petition for Writ of Error and ultimately overruled Petitioner's timely Motion for Rehearing. (Appendix A, *infra*, pages A-4, A-5). In the Motion for Judgment, the Motion for New Trial, and at all appellate stages of the proceedings, Petitioner raised the federal question sought to be reviewed here: whether under federal law the jury's findings should have been harmonized in favor of Petitioner in order to afford him full protection under the F.E.L.A. The excerpts from the record showing the raising of the federal question are set out in Appendix D.

REASONS FOR GRANTING WRIT

This case concerns the rights of Texas citizens to receive the full protection of the Federal Employers' Liability Act (45 U.S.C. § 51, et seq.). Section 51 of the Act states that a railroad shall be liable in damages to any person who is injured through the railroad's negligence while he is employed by such railroad. (Appendix B). The case also involves the duty of a trial court to harmonize the jury's findings in order to offer an injured

railroad employee the full protection he deserves under the F.E.L.A.

The way in which the jury answered Special Issues should not have precluded a judgment in Petitioner's favor. The jury's findings (Appendix C) were that while the railroad did not commit the specific acts of negligence submitted in Issue No. 1, 50% of the negligence which caused the occurrence was indeed attributable to the railroad. That the case at bar was brought under the Federal Employers' Liability Act is crucial. State law is not controlling in determining federal rights under the F.E.L.A.; rather, such cases must be determined according to a uniform federal law. *Dice v. Akron C & Y Ry.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); *Ellis v. Union Pacific Ry.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 (1947); *Bailey v. Central Vt. Ry.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943); *Illinois Central Ry. v. Coussens*, 350 U.S. 801, 76 S.Ct. 36 (1955); *Wabash Ry. v. Hayes*, 234 U.S. 86, 34 S.Ct. 729, 58 L.Ed. 1226 (1914). And the uniform federal law holds an employer liable for any negligence, no matter how slight, that contributes to an employee's injury. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-508; 77 S.Ct. 443, 448-449, 1 L.Ed.2d 493 (1957). Furthermore, a leading U.S. Supreme Court case stands for the proposition that in an F.E.L.A. case, a Court need not ignore a general finding of negligence simply because the jury finds the defendant railroad did not commit any of the specific acts of negligence submitted in the Special Issues. *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957). In *Arnold*, a case which originated in a Texas State District Court, the U.S. Supreme Court held that the jury's general finding that

the railroad negligently contributed to the plaintiff's injury was not in conflict with, but in fact *controlled over*, the jury's finding that the railroad did not commit any of the specific acts of negligence submitted in the Special Issues. The Court's basis for such a holding was that the specific acts of negligence submitted in the Special Issues did not encompass all possible forms of negligence on which the jury might have based its general finding of negligence. In referring to the federal rights asserted under the F.E.L.A., the Court stated:

> ". . . it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore *cannot accept interpretations that nullify their effectiveness*, for ' * * * the assertion of Federal rights, when plainly and reasonably made, *is not to be defeated under the name of local practice*' " [citations omitted; emphasis added] 353 U.S. 360, 361.

The Court obviously made it clear that the Texas practice of giving greater weight to specific findings of negligence was not to be followed in an F.E.L.A. case. It is interesting to note that Texas courts are aware of the duty the Supreme Court explained in *Arnold*. The last paragraph of the Tyler Court of Civil Appeals opinion in *Southern Pacific Transportation Company v. Bender*, 582 S.W.2d 568 (Tex. Civ. App.—Tyler 1979, writ granted) makes it clear:

> "We are not unmindful of cases by Texas courts which hold that a specific finding of negligence in a special issue controls over a general finding of negligence; however, this being an F.E.L.A. case, we do not consider those holdings applicable here." *id.* 573.

The awareness is not enough, however; Texas State Courts should be required to live up to this duty to harmonize a jury's findings.

In affirming its holding in *Arnold*, the U.S. Supreme Court later elaborated on a court's duty in interpreting the jury's answers to special issues. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). With respect to the railroad's contention that there was a fatal conflict between the jury's findings of negligence and the finding of no foreseeability, the Court said:

> "But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' [citations omitted] *We therefore must attempt to reconcile the jury's findings, by exegesis if necessary,* as in Arnold v. Panhandle & S.F.R. Co. [citations omitted], before we are free to disregard the jury's special verdict and remand the case for a new trial."
>
> *Id.* at 372 U.S. 119 (emphasis added)

Using this standard of exegesis in the case at bar, the jury's answers to Special Issues Nos. 1 and 4 can easily be harmonized in Petitioner's favor. Under *Arnold* and *Rogers*, it is arguable that the jury's general finding of negligence in response to Special Issue No. 4 was of sufficient weight to hold the railroad liable for negligence, since the Special Issue embraced not only negligence, but also causation. If the jury's finding with respect to Special Issue No. 4 were examined without regard to Special Issue No. 1, it in itself would support a judgment

for Plaintiff under "a fair reading" of the verdict. It is understandable that the jury could have believed the railroad was negligent in a way that was not encompassed by a failure to furnish "a reasonably safe place in which to work" or "reasonably safe equipment with which to work."

That is, the jury could have perceived the railroad negligent, through Conductor Taylor's conduct, in ordering Mr. Winzer to move a heavy object, without finding anything wrong with the place or equipment. Special Issue No. 1 was not exhaustive of all the possible ways in which the jury might have perceived the railroad negligent. Indeed, it seems clear that the jury did believe the railroad was negligent and thought they were so finding. (Appendix D, *infra*, pages D-8, D-9, D-10).

Clearly, it is possible under "a fair reading" to harmonize the seemingly conflicting answers to Special Issues 1 and 4, since there is a view of the case which makes the jury's answers consistent. In not meeting its duty to harmonize the jury's answers, the trial court, in effect, defeated Mr. Winzer's rights under the F.E.L.A. in the name of local practice. Under *Arnold* and *Gallick*, the trial court's interpretation of the jury's findings is unacceptable. It should be equally clear that judgment was entered for the Respondent in this case because of the inadequacy of the Special Issue system whereby the charge given to a jury can be too limited to elicit a response pointing to any particular act of negligence. In order to protect Mr. Winzer's rights under the F.E.L.A. the trial court should have harmonized the jury's answers in his favor and entered a judgment accordingly. The Texas Supreme Court failed to follow the United States

Supreme Court's reasoning in *Gallick* and therefore defeated Petitioner's rights under the F.E.L.A. Petitioner's Motion for Rehearing was improperly overruled by the Texas Supreme Court.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted, and for all other appropriate relief.

Respectfully submitted,

By: _____

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520 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002
Telephone: 713/225-5022

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of_____, 1981, all counsel of record were duly delivered a copy of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of Texas.

_____

JAMES H. BRANNON

APPENDIX A

NO. 8570

CHARLES W. WINZER,
Appellant

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellee

This is a negligence case brought under the Federal Employer's Liability Act, 45 U.S.C.A. § 51 (1972), et seq., wherein appellant, Charles W. Winzer, seeks damages for personal injuries received while working as a brakeman for appellee, the Kansas City Southern Railway Company. Based upon a jury verdict, the trial court entered judgment for appellee.

Winzer's cause of action was based upon the negligence of the railroad in failing to supply him with reasonably safe equipment and in failing to provide a reasonably safe place to work. In response to the negligence issues pleaded and submitted by appellant, the jury failed to find any negligence on the part of the railroad. The jury further found that appellant was negligent, and such negligence was a cause in part of his injuries. In answering the comparative negligence issue, the jury found appellant "50% negligent" and appellee to be "50% negligent."

Appellant brings forward two points of error. In the first point, he complains that the trial court "should have harmonized the jury's findings in favor of appellant in order to fully protect his rights under the F.E.L.A."

In his alternative second point, he complains that there was a fatal conflict in the jury's answer to Special Issue No. 1 (primary causal negligence) and Special Issue No. 4 (comparative negligence). We will discuss both points of error together.

Appellant argues, under his first point, that even though the jury found him to be negligent in causing his own injuries, he was entitled to a recovery for the reason that the jury found appellee to be 50 percent negligent in its answer to Special Issue No. 4, the comparative negligence issue. We do not agree.

The comparative negligence issue is not a liability issue, and the answer to such issues cannot impose liability upon a party who has been acquitted of any causal negligence. Such issue is a diminution of the damages issue and does not establish liability. *Southern Transportation Co. v. Allen,* 525 S.W.2d 300 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). Since appellant failed to discharge his burden on the negligence theory, the diminution of damages issue was immaterial and does not create a fatal conflict with the liability issues. *Missouri Pacific R. Co. v. Whittenberg & Alston,* 424 S.W.2d 427 (Tex. 1968); *Ruiz v. Flexonics,* 517 S.W.2d 853 (Tex. Civ. App.—Corpus Christi 1974, no writ); *Lewis v. Yaggi,* 584 S.W.2d 487 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.). See also, *Nevarez v. Missouri Pacific Railroad Company,* 333 S.W.2d 394 (Tex. Civ. App.—Waco 1960, no writ); *Gillock v. Texas & Pacific Railway Company,* 302 S.W.2d 717, 724 (Tex. Civ. App.—Texarkana 1957, no writ).

Finding no error, the judgment of the trial court is affirmed.

AFFIRMED.

It appearing to the court that the issues involved herein have been settled by clear authority of long standing and present no question or application of any rule of law of interest or importance to the jurisprudence of the State, it is ORDERED, pursuant to TEX. R. CIV. P. 452, that the opinion not be published.

Harold R. Clayton
Associate Justice

Opinion delivered
January 29, 1981

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

May 6, 1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of

NO. C-233

CHARLES W. WINZER

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY

was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

June 3, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of

C-233

CHARLES W. WINZER

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY

was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX B

FEDERAL STATUTES

28 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth

shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

UNITED STATES CONSTITUTION

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

"SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the railroad was negligent in failing to furnish Charles W. Winzer (a) a reasonably safe place in which to work or (b) reasonably safe equipment with which to work?

Answer "Yes" or "No" on each line in Column 1.

If any of your answers in Column 1 are "Yes", then state whether you find from a preponderance of the evidence that any such negligence on the part of the railroad was a cause which played any part, no matter how small, in actually bringing about or causing the injury, if any, to Charles W. Winzer on May 24, 1975, by answering "Yes" or "No" on the corresponding line of Column 2.

	Column 1 Negligence	Column 2 Cause
(a) Place to Work	NO	
(b) Equipment	NO	

SPECIAL ISSUE NO. 4

What percentage of the negligence that caused the occurrence do you find from a preponderance of the evidence to be attributable to each of the parties found by you to have been negligent?

The percentage of negligence attributable to a party is not necessarily measured by the number of acts or omissions found.

ANSWER by stating the percentage, if any, opposite each party:

ANSWER:	Plaintiff	50%
	Defendant	50%
	TOTAL	100%"

APPENDIX D

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS

60TH JUDICIAL DISTRICT

NO. B-104,284

CHARLES W. WINZER

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY

MOTION FOR JUDGMENT

To The Honorable Judge of Said Court:

COMES NOW, CHARLES W. WINZER, hereinafter referred to as Plaintiff in the above styled and numbered cause and shows the Court that the findings of the Jury, in response to the Special Issues submitted to them herein, entitles this Plaintiff to judgment against Kansas City Southern Railway Company, Defendant, as shown in the attached form of Judgment.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court render such Judgment in this behalf.

Respectfully submitted,

SCHMIDT, MATTHEWS & BRANNON, P.C.

By: _____

JAMES H. BRANNON
TBA #02895000
810 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002
Telephone: 713/223-4466
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 1980, a true and correct copy of the above and foregoing Motion was duly sent by certified mail, return receipt requested, to the attorney of record for Defendant, Mr. John D. Reinstra, Jr., San Jacinto Building, Beaumont, Texas, 77701; and on the same date the original of said pleading was duly sent by certified mail, return receipt requested, to the District Clerk of Jefferson County to be filed among the papers of this cause.

_____

JAMES H. BRANNON
TBA #0289500

D-3

NO. B-104,284

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

CHARLES W. WINZER

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR JUDGMENT

To The Honorable Judge of Said Court:

COMES NOW, CHARLES W. WINZER, hereinafter called Plaintiff in the above entitled and numbered cause and files this his Memorandum of Law in Support of Plaintiff's Motion For Judgment and would respectfully show unto the Court the following:

I.

In reviewing the Jury's answers to Special Issues in this case there seems to be a conflict between their answer to Special Issue No. 1 and their answer to Special Issue No. 4. When asked in Special Issue No. 1 whether the Defendant failed to provide the Plaintiff with a reasonably safe place in which to work and reasonably safe equipment with which to work, the Jury answered "No" on both counts. But in Special Issue No. 4 the Jury found that 50% of the negligence that caused the occurrence was attributable to the Defendant.

If this case were governed by Texas law (Art. 2212a) such a combination of answers to Special Issues would result in a judgment for the Defendant, at least until and unless the Texas Supreme Court holds to the contrary. For example in *Garza v. Waco Scaffold and Shoring Co.*, 576 S.W.2d 442 (El Paso Civ. App. 1978, writ ref'd n.r.e.), the El Paso Court of Civil Appeals held that the specific finding in Special Issue No. 1 that the defendant's failure to provide a locking mechanism did not render the equipment plaintiff was using defective was controlling over the general finding that the defendant was 25% negligent. Therefore it was proper that the trial court entered a take nothing judgment. A similar result occurred in *Ingles v. Cohen*, 543 S.W.2d 455 (Waco Civ. App. 1976, writ ref'd n.r.e.). In that case the jury failed to find that one of the defendants was negligent as to the specific acts asked about in the Special Issues. But when asked about percentages the jury found that that same defendant was responsible for 30% of the negligence that caused the occurrence. The Waco Court of Civil Appeals held that the specific findings of no liability control over the general findings of percentages of negligence. Plaintiff concedes the point: Texas law calls for a take nothing judgment in this case, under our comparative negligence status.

Federal law, on the other hand, calls for a different result and it is federal law that controls in this case. Plaintiff brought suit in this case under 45 U.S.C.A. § 51, et seq. commonly known as the Federal Employer's Liability Act. State law is not controlling in determining federal rights under the F.E.L.A. and such cases must be determined according to a uniform federal law. *Dice v. Akron C & Y Ry.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed.

398 (1952); *Ellis v. Union Pacific Ry.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 (1947); *Bailey v. Central Vt. Ry.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943); *Illinois Central Ry. v. Coussens*, 350 U.S. 801, 76 S.Ct. 36 (1955); *Wabash Ry. v. Hayes*, 234 U.S. 86, 34 S.Ct. 729, 58 L.Ed. 1226 (1914). The uniform federal law holds the employer liable for any negligence, no matter how slight, that contributed to the employee's injury. *Rogers v. Missouri Pacific Ry.*, 352 U.S. 500, 506-508, 77 S.Ct. 443, 448-449, 1 L.Ed. 493 (1957). There are two U.S. Supreme Court cases that deal with this concept of employer liability and apparent conflicts between Special Issues.

In deciding the landmark case, *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed. 889 (1957) which came up from Texas, the U.S. Supreme Court held that the jury's general verdict that the railroad's negligence contributed to the plaintiff's injury was not in conflict and controlled over the jury's finding that the railroad did not commit any of the specific acts of negligence listed in the Special Issues. The Court reasoned that the specific acts listed were not exhaustive of all the possible ways in which the jury could have perceived the railroad to be negligent. Because of this deficiency in the use of Special Issues the Court held that the general verdict controls in F.E.L.A. cases. The Court went on to hold that "the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." 353 U.S. 360, 361. Thus the Court made it clear that the Texas practice of giving greater weight to specific Special Issues was not to be followed in an F.E.L.A. case.

More recently in an F.E.L.A. case styled *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed. 618 (1963), the U.S. Supreme Court affirmed its holding in *Arnold* and *Rogers*. In *Gallick* the jury found in response to Special Interrogatories that the railroad was negligent in a general way by maintaining a filthy pool of water on its premises and that this negligence proximately caused Plaintiff's injuries. Then the jury found that it was not foreseeable that the railroad's actions might lead to the plaintiff's injuries. The railroad claimed that there was a fatal conflict between the finding of negligence and the finding of no foreseeability. So the railroad wanted a judgment, or at least a new trial. It got neither.

The Court said (See Exhibit A):

> "But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way [citations omitted]. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in Arnold v. Panhandle & S.F.R. Co. [citations omitted] before we are free to disregard the jury's special verdict and remand the case for a new trial."
>
> *id.* at 372 U.S. 119

Using this standard of exegesis, or interpretation, we can see how the jury believed that there was nothing wrong with the place or equipment, but believed the railroad negligent in ordering Mr. Winzer to do the work in question. This collective belief of the jury resulted in the answers to the first issue and the fourth issue (See exhibits B and C.)

The fourth issue establishes negligence and causation, and is sufficient in itself to support a judgment for plaintiff under the Federal Employer's Liability Act.

In conclusion, Plaintiff would call to the court's attention the last paragraph of the Tyler Court of Appeals Opinion in *Southern Pacific Transportation Company v. Bender,* 528 S.W.2d 568 (Tyler Civ. App. 1979, writ granted). Plaintiff's attorney in the case at bar represented the Plaintiff Bender in that case and although the Tyler Court's Opinion was unfavorable to Plaintiff Bender the last paragraph supports Plaintiff's position here.

The Tyler Court said:

> "We are not unmindful of cases by Texas courts which hold that a specific finding of negligence in a special issue controls over a general finding of negligence; however, this being an F.E.L.A. case, we do not consider those holdings applicable here."

Respectfully submitted,

SCHMIDT, MATTHEWS &
BRANNON, P.C.

By: _____

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Telephone: 713/223-4466

Attorneys for Plaintiff

Exhibit "B"

(transcribed conversation between attorney and juror; Note: only the pertinent portions of Exhibit B are printed)

* * * *

JR: Well, I'm talking about . . . actually about both, ma'm, uh, since the way the issues were answered, it probably will mean that uh that he will receive nothing in terms of the suit. He won't receive the $300,000 at all.

T: Well, why shouldn't he?

JR: Pardon me.

T: Why shouldn't he receive it?

* * * *

Exhibit "C"

(transcribed conversation between attorney and juror;
Note: only the pertinent portions of Exhibit C are printed)

* * * *

JR: This is Jim Riley. May I speak to Mrs. Marie Lewis, please?

ML: This is she.

JR: Mrs. Lewis, I am an attorney that was associated with Mr. Brannon. He was the Plaintiff's lawyer on the case that you were just a juror on.

ML: Oh, yes sir.

JR: Well, ma'm .We do this as common practice and we are contacting all of the jurors, and we are kinda curious as to how you reached your decision.

* * * *

JR: So, you thought they were both at fault?

ML: Yeah.

* * * *

ML: . . . But . . . but what we really thought was that . . . I think they were asking for $600,000 but by both of them being, uh, well, the railroad responsible and him, we thought half would be suitable, at least, that's what I thought, too. That half would have been suitable. Is that what you're speaking of? the amount?

JR: Yes, ma'm.

* * * *

JR: Well, you know that he's not going to get anything?

ML: He's not!!?

JR: Not a dime.

ML: No, now, we didn't know that. We were under the impression that he would get half. We were under the impression that he would get what we uh said. That $300,000 plus the doctor bill plus $5400 for the coming doctor's bill. Now that's what we were under the impression of.

* * * *

D-11

CAUSE NO. B-104,284

IN THE
60th JUDICIAL DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS

CHARLES W. WINZER

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY

JUDGMENT

BE IT REMEMBERED that on February 4, 1980, came on for trial the above-styled and numbered cause, the plaintiff, Charles W. Winzer, appearing in person and by and through his attorney, and the defendants, the Kansas City Southern Railway Company and the Louisiana and Arkansas Railway Company, appearing by and through their attorneys, whereupon all parties announced ready for trial. Thereupon, a jury of twelve duly qualified persons was selected and sworn and the case then proceeded to trial from day to day until all evidence was received, all of the parties had closed their case and argument was presented to the jury.

BE IT FURTHER REMEMBERED that February 7, 1980, the jury returned into open Court its verdict consisting of answers to special issues, which verdict was received by the Court, filed and spread upon the minutes of the Court. In accordance with the verdict of the jury, it is ORDERED, ADJUDGED and DECREED by the Court that plaintiff, Charles W. Winzer, have and recover nothing of and from the defendant, Kansas City

Southern Railway Company and the Louisiana and Arkansas Railway Company.

All costs of Court are adjudged against the plaintiff, Charles W. Winzer for which let execution issue.

SIGNED, RENDERED and ENTERED on this the 13th day of March, 1980.

/s/ MELVIN COMBS
District Judge

D-13

NO. B-104,284

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60th JUDICIAL DISTRICT

CHARLES W. WINZER

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY

ORIGINAL MOTION FOR NEW TRIAL
BY PLAINTIFF, CHARLES W. WINZER

To The Honorable Judge of Said Court:

COMES NOW, Charles W. Winzer, and herewith makes this his Original Motion for New Trial in the above case as to all parties and as grounds for this Original Motion for New Trial, Plaintiff, Charles W. Winzer, would respectfully show unto this Court the following:

I.

THE TRIAL COURT ERRED IN OVERRULING AND DENYING THE PLAINTIFF'S MOTION FOR JUDGMENT AS FEDERAL LAW GOVERNS IN AN FELA CASE AND NOT STATE LAW.

II.

THE TRIAL COURT ERRED IN OVERRULING AND DENYING THE PLAINTIFF'S MOTION FOR

JUDGMENT BECAUSE OF AN APPARENT CONFLICT BETWEEN THE JURY'S ANSWERS TO SPECIAL ISSUES NOS. 1 AND 4, AS FEDERAL LAW RULES IN THE CASE AT BAR AND FEDERAL LAW REQUIRES THE HARMONIZING OF APPARENT CONFLICTS IN AN FELA CASE.

* * *

D-15

NO. B-104,284

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60th JUDICIAL DISTRICT

CHARLES W. WINZER

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY

ORDER OVERRULING PLAINTIFF'S
MOTION FOR NEW TRIAL

On this the 21st day of April, 1980, came on to be heard Motion for New Trial by Plaintiff, Charles W. Winzer, in the above entitled and numbered action, and this Court having read the Motion and having heard the argument of counsel is of the opinion that such Motion for New Trial should be overruled. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Motion for New Trial by Plaintiff, Charles W. Winzer is hereby overruled, TO WHICH JUGMENT OF THIS COURT THE PLAINTIFF EXCEPTED AND GAVE NOTICE OF HIS INTENTION TO APPEAL.

Signed and entered this 29th day of April, 1980, at Beaumont, Jefferson County, Texas.

/s/ THOMAS A. THOMAS
Presiding Judge

APPROVED AS TO FORM:

Schmidt, Matthews & Brannon, P.C.

BY: /s/ JAMES H. BRANNON
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Attorneys for Plaintiff

D-17

NO. 8570

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT BEAUMONT

CHARLES W. WINZER,
Appellant

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellee

BRIEF FOR APPELLANT CHARLES W. WINZER

FIRST POINT OF ERROR

THE TRIAL COURT SHOULD HAVE HARMONIZED THE JURY'S FINDINGS IN FAVOR OF APPELLANT IN ORDER TO FULLY PROTECT HIS RIGHTS UNDER THE F. E. L. A.

D-18

NO. 8570

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT
AT BEAUMONT

CHARLES W. WINZER,
Appellant

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellee

APPELLANT'S MOTION FOR REHEARING

ASSIGNMENT OF ERROR NO. 1

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING APPELLANT'S POINT OF ERROR NO. 1 AND IN FAILING TO HOLD THAT THE TRIAL COURT ERRED IN FAILING TO HARMONIZE THE JURY'S FINDINGS IN FAVOR OF APPELLANT.

COURT OF CIVIL APPEALS
Ninth Supreme Judicial District
Beaumont, Texas 77701

Martin Dies, Jr., Chief Justice
Quentin Keith, Associate Justice
Harold R. Clayton, Associate Justice

J. A. Hulgan
Clerk
(713) 835-8402

February 26, 1981

Mr. James H. Brannon, Attorney
723 Main St.
Houston, Texas 77002

Mr. Louis M. Scofield, Jr., Attorney
San Jacinto Building
Beaumont, Texas 77701

In Re: No. 8570, Charles W. Winzer vs.
Kansas City Southern Railway Co.

Gentlemen:

The Appellant's Motion for Rehearing in the above styled and numbered cause was overruled February 26, 1981.

Very truly yours,

By: /s/ SHIRLEY FORREST,
Deputy

Joe A. Hulgan,
Clerk

D-20

NO. _____

IN THE
SUPREME COURT OF TEXAS

CHARLES W. WINZER,
Petitioner

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent

APPLICATION FOR WRIT OF ERROR

POINT OF ERROR NO. 1

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR IN FAILING TO HARMONIZE THE JURY'S FINDINGS IN FAVOR OF PETITIONER.

D-21

NO. C-233

IN THE
SUPREME COURT OF TEXAS

CHARLES W. WINZER,
Petitioner

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent

MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR

To The Honorable Supreme Court Of Texas:

Petitioner has no new theories to argue, believing that the points raised in the Application justify granting a writ and hearing the case.

One good reason, however, for hearing the case is to clarify the law on the question of conflicting jury answers. Trial judges are still giving various interpretations on the very issue in question; the Courts of Civil Appeals

have not adequately solved the problem and this Court has not spoken on the issue. If it is never to be a conflict for the jury to answer the comparative negligence issue "differently" than the primary negligence issue(s), then the trial bar should know it.

Finally, Petitioner feels that this Court should give a full consideration to the important federal policy involved in applying the Federal Employers' Liability Act —since railroad workers have no other compensation statute available. A reading of case law—including the cases cited heretofore—reveals the courts bending over backwards to grant recovery for the injured railroad worker. The *Gallick* case, cited by this unanimous Court recently in *Bender v. Southern Pacific,* 305 S.W.2d 257 (1980) shows the lengths to which our United States Supreme Court has gone when the alternative is to deny all recovery to the injured employee.

Our Texas courts should do at least as much.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner Charles W. Winzer prays that this Court grant his Motion for Rehearing on Application for Writ of Error, grant the Petitioner's Application for Writ of Error, that the judgments of the District Court and the Court of Civil Appeals be reversed and that judgment be entered for the Petitioner, or, in the alternative, that the cause be remanded for a new trial and that Petitioner have

such other and further relief, legal or equitable, to which he may be justly entitled.

Respectfully submitted,

JAMES H. BRANNON, P.C.

By: _____

JAMES H. BRANNON
TBA #02895000
520 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002
Telephone: 713/225-5022

Attorney for Petitioner
Charles W. Winzer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion For Rehearing On Application For Writ of Error was duly sent Express Mail to counsel for Appellee, Kansas City Southern Railway Company, Mr. Louis M. Scofield, Jr., Mehaffy, Weber, Keith & Gonsoulin, San Jacinto Building, Beaumont, Texas, 77701, this 19th day of May, 1981.

_____

JAMES H. BRANNON
TBA #02895000

Opposition

81-439

Office-Supreme Court, U.S.
FILED
SEP 28 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

CHARLES W. WINZER,
Petitioner

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

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QUESTIONS PRESENTED

1.

The Trial Court's entry of judgment for the Railroad was proper since the verdict supported such judgment and no other.

2.

Whether federal or state procedures are applied to this case the judgment of the Trial Court is entirely proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

CHARLES W. WINZER,
Petitioner

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Kansas City Railway Company, Respondent, respectfully files this its Brief in Opposition to Petition for Writ of Certiorari filed by Charles W. Winzer, Petitioner, and would respectfully show unto the Court the following:

STATEMENT OF THE CASE

Respondent, Kansas City Southern Railway Company, disagrees with portions of the "Statement of the Case" set out in Petitioner's Brief since it misrepresents the case.

Accordingly, Respondent herewith submits its own Statement of the Case.

This is a negligence case brought under the Federal Employers' Liability Act (FELA). 48 U.S.C.A. § 51, et seq. The Plaintiff/Petitioner, Charles W. Winzer, filed suit in the 60th District Court of Jefferson County, Texas, claiming back injuries allegedly received while he was working as a brakeman for the Defendant/Respondent, Kansas City Southern Railway Company.

The accident took place on May 24, 1975. Winzer was working for Respondent at the International Paper Company yard in Cullen, Louisiana. He claimed to have injured his back when he attempted to move a device designed to "rerail" railroad cars. Contrary to the assertion of Petitioner that his supervisor, Conductor Taylor, ordered him to lift the rerailing device, Conductor Taylor denied ordering Winzer to do such lifting. Actually, Taylor ordered Winzer not to assist in lifting the rerailing device. With this question hotly contested at trial, the jury found that Respondent did not fail to provide Plaintiff with a reasonably safe place to work or with reasonably safe equipment and was not negligent in any other related acts or omissions, but that petitioner, Winzer, was negligent in attempting to lift the rerail device. (Appendix A, infra, pps. A-1, A-2, A-3).[1]

The jury disregarded the predicate of the Court concerning the apportionment issue and answered it "Plain-

1. The verdict upon which the Court entered judgment is embodied in Special Issues Nos. 1 through 4. These issues are set out in their entirety in Appendix A. Omitted from the issues only partially quoted in Petitioner's Brief are the instructions accompanying Special Issue No. 1 and the predicate accompanying Special Issue No. 4.

tiff—50%" and "Defendant—50%". (Appendix A, infra, p. A-3).

Upon this verdict the Trial Court entered its judgment that the plaintiff take nothing. This judgment was affirmed in an unpublished opinion by the Texas Court of Civil Appeals, and the Texas Supreme Court refused Petitioner's Petition for Writ of Error.

ARGUMENT

This case was decided by a jury on its facts. It presents no unique questions of law, nor does it present any constsitutional questions.

The question presented is not, as contended by Petitioner, whether a Texas trial court has the duty to harmonize a general jury finding of negligence with a specific jury finding of no negligence in order to protect a railroad employee's rights under the Federal Employers' Liability Act, because Petitioner did not obtain a general finding of negligence against the Railroad. On the contrary he obtained a general finding of no negligence against the Railroad. Accordingly:

1.

The Trial Court's entry of judgment for the Railroad was proper since the verdict supported such judgment and no other.

2.

Whether federal or state procedures are applied to this case the judgment of the Trial Court is entirely proper.

---

1. (Restated)

The Trial Court's entry of judgment for the Railroad was proper since the verdict supported such judgment and no other.

For the plaintiff to recover in an FELA case a finding of negligence on the part of the Railroad is required. 45 U.S.C.A. § 51. The jury did not find the Railroad negligent even on the extremely general and broad grounds which were pleaded and submitted, but the jury did find the plaintiff negligent. The jury was asked whether the Railroad failed to provide the plaintiff with a reasonably safe place to work or with reasonably safe equipment and specifically instructed the jury that a reasonably safe place in which to work "includes any negligent acts or omissions concerning such place or equipment you find from a preponderance of the evidence to have been committed by the Railroad." (Appendix A, infra, p. A-1).

In the face of this, Petitioner seeks to obtain a judgment based upon the apportionment finding alone, ignoring the instruction, issues, and answers found by the jury on the liability aspect of the case. The apportionment issue is not and cannot be a liability finding.

Petitioner cites no authority, federal or state, where an apportionment issue has been held a liability issue upon which judgment was based. The cases Petitioner relies on are simply not applicable. *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U.S. 360 (1957); *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963). These cases were principally concerned with determining the sufficiency of evidence to support general findings of negligence and causation against the railroad. Unlike our

case where the jury exonerated the Defendant of all negligence, in both *Gallick* and *Arnold* the jury found the railroad negligent on a negligence issue. The "conflict" addressed in the *Arnold* case was whether specific *liability* issues found in favor of the Defendant conflicted with the general *liability* finding in favor of the plaintiff. The "conflict" addressed in the *Gallick* case was whether specific *liability* issues concerning foreseeability and found in favor of the railroad conflicted with the negligence *liability* findings. Neither case held an allocation issue to be a liability issue. As a matter of fact, the "safe place to work" question which Petitioner seeks to characterize as a specific issue in our case was treated as a "general" issue in *Arnold. See Panhandle & Santa Fe Railway Co. v. Arnold,* 283 S.W.2d 303 (Tex. Civ. App.—Amarillo, 1955). In short, neither case is either factually or legally similar to the case at hand.[2]

From his misplaced reliance on these cases petitioner complains he was denied a federal right. The opposite is true. Were the Petitioner's interpretation of the apportionment issue correct it would serve to deprive plaintiffs of the benefits of the FELA in cases where the "shoe is on the other foot" (where negligence and causation are found against the railroad and the plaintiff exonerated, yet the apportionment issue answered). Such a case has

---

2. *Rogers v. Missouri Pacific Railway,* 352 U.S. 500, is also relied upon by Petitioner but it does not remotely apply to the question at hand. As a matter of fact, Petitioner misstates the *Rogers* opinion. That case held that under the FELA an employer is liable for negligence which was a cause, no matter how slight, of the employee's injury. It does not hold that an employer has a greater duty than ordinary care. The "no matter how slight" statement in the opinion applies to the degree of causation not the degree of negligence, which of course, is entirely consistent with the concept of pure comparative negligence under the FELA.

arisen in Texas. *Southern Pacific Transportation Co. v. Allen,* 525 S.W.2d 300 (Tex. Civ. App.—Houston 1975, no writ). There, in response to liability issues the jury found that the negligence of the plaintiff was not a cause of his injury. They answered the apportionment issue finding 65% negligence against the railroad and 35% against the plantiff. The Texas court refused to reduce the plaintiff's award, specifically holding that the apportionment issue is not a liability issue and was immaterial since the plaintiff was exonerated of causal negligence in the liability issues. To accept petitioner's argument would be to disapprove the action of the court in *Allen.*

The Petitioner's interpretation of the allocation issue would invite a jury to "find" liability on a ground for which the law may not impose a duty, and would open the door for the jury to find negligence on some ground which is neither pleaded nor proved. Petitioner's difficulties in this case do not arise from application of state procedure in derogation of a federal substantive right. The negligence submission in Special Issue No. 1 was in broad, general form. The instruction with Special Issue No. 1 left no doubt that "safe place to work" included "any negligent acts." (Appendix A, infra, p. A-1).

In short, the apportionment issue is not a liability issue whether it be viewed under state or federal law, and to grant Petitioner judgment upon a strained reading of that issue would ignore the clear findings of the jury on the liability issues and would ignore the entire basis upon which this case was pleaded, tried and argued. Furthermore, it would create bad law in derogation of the rights of plaintiffs as well as defendants under the FELA.

2. (Restated)

Whether federal or state procedures are applied to this case the judgment of the Trial Court is entirely proper.

If this case were tried under federal procedure, and if we accept Petitioner's contention that the apportionment issue constituted a general verdict, then a conflict is created between that issue and the very broad and general Special Issue No. 1, with its instruction. This being the case federal law and procedures would allow the trial court's judgment notwithstanding the "general verdict." 28 U.S.C.A. Rule 49(b); *Stoddard v. School District No. 1, etc.*, 590 F.2d 829 (10th Cir. 1979); *Turner v. Global Seas, Inc.*, 505 F.2d 751 (6th Cir. 1974); *Nimnicht v. Dick Evans, Inc.*, 477 F.2d 133 (5th Cir. 1973). Rule 49(b) states:

> "Rule 49(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. . . . *When the answers are consistent with each other but one or more is consistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict,* or the court may return the jury for further consideration of its answers and the verdict or may order a new trial." 28 U.S.C.A., Federal Rules of Civil Procedure, Rule 49(b). (Emphasis supplied).

If Texas state procedures apply, the law is clear that no irreconcilable conflict exists and the apportionment

finding is immaterial. *Southern Pacific Transportation Co. v. Allen,* 525 S.W.2d 300 (Tex. Civ. App.—Houston 1975, no writ); *Lewis v. Yaggi,* 584 S.W.2d 487 (Tex. Civ. App.—Tyler, 1979, writ ref'd n.r.e.); *Garza v. Waco Scaffold & Shoring Co.,* 576 S.W.2d 442 (Tex. Civ. App.—El Paso, 1978, writ ref'd n.r.e.); *Tennessee Gas Pipeline Co. v. Hartman,* 556 S.W.2d 616 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Ingles v. Cohen,* 543 S.W.2d 455 (Tex. Civ. App.—Waco, 1976, writ ref'd n.r.e.).

CONCLUSION

The judgment of the Trial Court in this case is entirely proper under either federal or state procedures. Petitioner was not deprived of any federal right since he submitted the liability aspects of his case very generally to a jury and the jury found the Railroad was not negligent.[3]

3. Petitioner's speculations as to the thought processes of the jury are wholly inappropriate. Even less appropriate is his including in his petition excerpts of "transcripts" of conversations between some attorney and some jurors. (Petition, pps. D-8 through D-10). In the event the court wishes to consider these unsworn hearsay "transcripts" attached in Appendix B are the full contents of statements signed by three jurors attached to Respondent's Reply to the Plaintiff's Original Motion for New Trial filed in the trial court.

PRAYER

WHEREFORE, Respondent respectfully prays that the Petition for Certiorari be denied, and for all other appropriate relief.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Respondent, Kansas
City Southern Railway Company

By: _____
JOHN D. RIENSTRA, Of Counsel
State Bar No. 16910000

1400 San Jacinto Building
Beaumont, Texas 77701
(713) 835-5011

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief has been served on opposing counsel by placing same in the United States Mail, addressed to opposing counsel, on this the _____ day of September, 1981.

_____
JOHN D. RIENSTRA

APPENDIX A

In connection with Special Issue No. 1, you are further instructed that by the term a "reasonably safe place in which to work" is meant such a place for employees to work as would have been provided by a person of ordinary prudence in the exercise of ordinary care under the same or similar circumstances.

It also includes any negligent acts or omissions concerning such place or equipment you find from a preponderance of the evidence to have been committed by the railroad.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the railroad was negligent in failing to furnish Charles W. Winzer (a) a reasonably safe place in which to work or (b) reasonably safe equipment with which to work?

ANSWER "Yes" or "No" on each line in Column 1. If any of your answers in Column 1 are "Yes", then state whether you find from a preponderance of the evidence that any such negligence on the part of the railroad was a cause which played any part, no matter how small, in actually bringing about or causing the injury, if any, to Charles W. Winzer on May 24, 1975, by answering "Yes" or "No" on the corresponding line of Column 2.

	COLUMN 1 Negligence	COLUMN 2 Cause
(a) Place to work	No	
(b) Equipment	No	

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that on the occasion in question the plaintiff, Charles Winzer, was negligent in any of the following particulars:

(1) in attempting to move the "bat wing frog", answer "yes" or "no".

ANSWER: Yes

(2) in failing to request additional assistance before attempting to mave the "bat wing frog", answer "yes" or "no".

ANSWER: No

SPECIAL ISSUE NO. 3

If you have answered any subdivision of the preceding Special Issue No. 2 "Yes", then answer the following:

Do you find from a preponderance of the evidence that any of the following acts of negligence on the part of the plaintiff was a cause which played any part, no matter how small, in actually bringing about or causing the plaintiff's injuries:

(1) in attempting to move the "bat wing frog", answer "yes" or "no".

ANSWER: Yes

(2) in failing to request additional assistance before attempting to move the "bat wing frog", answer "yes" or "no".

ANSWER: No

If you have answered either part of Column 2 of Special Issue No. 1 "Yes", and have also answered either (1) or (2) of Special Issue No. 3 "Yes", then answer the following:

SPECIAL ISSUE NO. 4

What percentage of the negligence that caused the occurence do you find from a preponderance of the evidence to be attributable to each of the parties found by you to have been negligent?

The percentage of negligence attributable to a party is not necessarily measured by the number of acts or omissions found.

ANSWER by stating the percentage, if any, opposite each party:

ANSWER:	Plaintiff	50%
	Defendant	50%
	TOTAL	100%

APPENDIX B

4/19/80

My name is Gloria A. Trahan. I live at 950 Church, Beaumont, Texas.

I was a juror in the lawsuit brought by Mr. Charles Winzer against the KCS railroad.

I recall our answers to the issue concerning the alleged negligence of the KCS railroad. I did not think the railroad was negligent and I intended to so find.

I also figured that our findings would mean Mr. Winzer could not recover any money from this lawsuit.

I have read the above statement and it is true and correct, accurate and complete.

/s/ GLORIA A. TRAHAN
4/19/80

Witnessed by:

/s/ LOUIS A. SCOFIELD
4/19/80

B-2

4/20/80

My name is Annie M. Cappadona. I live at 8549 Greenbriar, Port Arthur, Texas.

I was one of the jurors in the lawsuit brought by Mr. Charles Winzer against the KCS railroad. I listened carefully to the evidence and my decision was based only on the evidence.

I did not believe the railroad was negligent and I intended the verdict to show that.

I did not consider one way or the other whether Mr. Winzer would recover any money when I was deciding the negligence issues. I simply did not feel that the railroad was negligent.

I have read the above statement and it is true and correct, accurate and complete.

/s/ ANNIE M. CAPPADONA
4/20/80

Witnessed by:

/s/ LOUIS M. SCOFIELD

4/20/80

My name is Kenneth W. Talbott. I live at 3107 Central Blvd., Nederland, Texas.

I was one of the jurors in a case brought by Mr. Charles WINZER against the KCS railroad. During the trial I listened carefully to the evidence and based my decision on the evidence. I did not feel that the railroad was negligent and I intended the verdict to show that.

Whether or not Mr. Winzer would recover any money did not enter my mind while considering the negligence issues. I simply felt that the railroad was not negligent and that was our finding.

/s/ KENNETH W. TALBOTT
4/20/80

Witnessed by:

/s/ LOUIS M. SCOFIELD
4/20/80